



WIPO DEVELOPMENT AGENDA- CHALLENGES AND OPPORTUNITIES

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Member States of WIPO have achieved a major breakthrough in their discussions on a development agenda for WIPO which marks a milestone in the history of the Organization. Negotiators from 93 member states and 40 observers, meeting from June 11 to 15, 2007 in the context of a forum that is looking at proposals to enhance the development dimension in WIPO's work, agreed on a final list of proposals which have been adopted by the WIPO General Assembly in September 2007. This includes the establishment of a new Committee on Development and Intellectual Property (CDIP).

The breakthrough involved finding mutually acceptable solutions for a number of difficult issues. The process and the spirit of compromise and mutual understanding in which the discussions took place are an important contribution to international efforts to promote the development of a balanced intellectual property system that is responsive to the needs and interests of all countries- developed and developing alike.

factor that leads to economic growth and the reduction of poverty. Other important factors include developing human capital (developing an educated and skilled labour force), liberalising trade and investment policies, developing new technologies through indigenous R&D, creating an innovation infrastructure, strengthening the rule of law, pursuing stable macroeconomic policies, and implementing pro- competitive regulatory policies. Conversely, endemic illegal copying and counterfeiting, ineffective government, and corrupt practices distort competitive markets, divert resources to non-productive uses, and deter investment and technology transfer.

In the knowledge-driven economy of the 21st century, intellectual property will play an increasingly important role as a tool for economic, cultural and social development. WIPO is fully aware of the changing role of intellectual property in development and the related challenges and opportunities facing Member States. Most recently, for example, the Director General reported: "The increasing market value of knowledge-based creations and outputs, and the economic dynamism they can fuel, is generating new and broad-based opportunities for economies to create national wealth, as the basis for sustainable development, and to deliver more widespread welfare gains from technological development."²

To maximize the use and effectiveness of IP as a tool for development, countries at various levels of development will need to adopt successful strategies tailored to their requirements that involve the sustained creation and use of knowledge. The World Bank Institute's Knowledge for Development Program recently identified "four pillars" of the

modern knowledge economy: (1) an educated, creative and skilled labor force, (2) an effective national innovation system (including research centres and universities), (3) modern and developed information infrastructure, and (4) an economic and institutional regime that provides good economic policies and incentives for creators and innovators (including adequate protection and enforcement of intellectual property rights).

WIPO could play the leading role for countries pursuing knowledge-based development strategies by providing assistance to countries that identify intellectual property-related weaknesses in their economic and institutional regimes. Using the World Bank Institute's "Knowledge Assessment Methodology" (KAM) benchmarking tool, for an effective property (IP) system can facilitate economic and cultural development but alone cannot bring about such development. Rather, the protection of intellectual property is only one intellectual example, a WIPO Member State could identify a weakness in its innovation system and its economic and institutional regime. The Member State then could search the WIPO Partnership Database for assistance opportunities. Under the "WIPO Partners" section of the database, for instance, the Member State may be able to identify a regional development bank offering assistance in improving the Member State's economic and institutional regime which coupled with civil society expertise could offer assistance in strengthening the Member State's innovation system.

The PCDA reached agreement on a set of general principles and objectives covering five clusters of activities on the following themes: Cluster A: Technical Assistance and Capacity Building; Cluster B: Norm-setting, Flexibilities, Public Policy and Public Domain; Cluster C: Technology Transfer, Information and Communication Technology (ICT) and Access to Knowledge; Cluster D: Assessments, Evaluation and Impact Studies; and Cluster E: Institutional Matters Including Mandate and Governance. A final set of 45 proposals were submitted to the general Assembly and approved.

In order to accelerate the implementation of the agreed proposals, the PCDA further decided to continue informal consultations on proposals that can be implemented immediately, following approval of the recommendations by the 2007 WIPO General Assembly later this year. Member states also agreed to establish a Committee on Development and Intellectual Property composed of member states and open to the participation of all accredited intergovernmental and non-governmental organizations. The new committee, to be convened in the first half of 2008, will adopt rules of procedure based on the WIPO General Rules of Procedure. The number and duration of the meetings of the Committee are to be decided by the WIPO General Assembly. The mandate of the PCDA will not be renewed.

capacity is required to conduct surveys of specific sectors targeted for growth in developing practical strategies with achievable goals. The surveys should identify problems and opportunities member states face in each identified sector. Countries may wish to pay special attention to the needs of small and medium-sized businesses (SMEs). Examples of such country-level assessments could be:

- A developing country seeking to develop its creative industries will need to evaluate, among other factors, available sources of investment, the adequacy of support services, methods of improving participation of local creative industries in domestic intellectual property regimes, level of development of marketing and distribution systems, and possible deficiencies in its intellectual property rights system, including enforcement.
- A country seeking to enhance domestic productivity by attracting foreign technologies may wish to tailor a national survey to focus on possible impediments to the transfer of technology such as weaknesses in its intellectual property regime (including inadequacies

in both norms and enforcement) and legal or regulatory obstacles to licensing and establishing business arrangements.

All this would require a robust IP infrastructure in terms of state of the art software & management tools, dedicated

Cluster A:

Assistance and Capacity Building

Balancing incentives for IPR holders with access for users is the real challenge. While stronger IP regimes can lead to greater trade and inflows from FDI they can reduce social welfare by restricting access to protected technologies and knowledge. Developing countries require sophisticated technical expertise and decision making capabilities to formulate policy and adopt legislation that balances the different public policy objectives and stakeholders interests within the context of economic and technological development.

Use of IP in development should not only be equitable but also perceived to be so. Public interest should be kept paramount in making the transition to or expanding the use of intellectual property assets as a tool for economic development.

Local IP which includes copyright based industry, grass root level innovations, geographical indications, traditional knowledge and expressions of culture provides an enormous scope for wealth creation and development. In formulating a successful strategy for the creation and use of knowledge as an engine of economic growth, Member States need accurate and current data on the economic contribution of their creative and innovative industries. WIPO could play a leading role in this initiative, for example by helping develop survey methodologies for Member States interested in conducting targeted surveys for assessment of data on the economic contribution of such industries.

The results of the surveys should be made available to other Member States through the proposed WIPO Partnership Database, which also may be useful in identifying partners and resources for follow-on action. Based on the national experiences evidenced within the information collected through these surveys, Members should establish “best practices” relating to enhancing domestic environments for the development of creative industries and attracting foreign investment and technologies through strong intellectual property protection. Such best

practices could be used to strengthen measures such as outreach efforts to local creative industries with respect to maximizing innovative capacity and participation in domestic intellectual property regimes and providing effective enforcement (in conjunction with the Advisory Committee on Enforcement) of intellectual property rights.

Intellectual property serves as an important tool in economic, social and cultural development by encouraging domestic innovation and creativity, investment and technology transfer. WIPO’s current vision for the Millennium, as approved by its Member States, is to promote intellectual property strategies that facilitate the “journey from developing to developed.” Consistent with the United Nations Millennium Development Goals (MDG), the WIPO Proposed Program and Budget for 2006/07 sets forth in Program 3 (Strategic Use of IP for Development) the following important objective: “To assist Member States in effectively utilizing the IP system for development, extending support to SMEs and implementing IP assets management capacity.”⁵

The WIPO Secretariat should explore the feasibility of WIPO conducting economic surveys on a regular basis to support the creative and innovative sectors with useful data and monitor growth of intellectual property-based industries. Aggregate economic data obtained through such surveys should be made available to Member States who can then use this information in formulating national strategies / IP policies. Ownership of the national strategies should however be with the national governments. The wider policy

framework (e.g. R&D policy, Science & Technology policy, competition policy) should also be taken into account when establishing IPR regimes in developing countries.

In most developing countries intellectual property rights remain neglected at the student level. Young people, leaving the universities with a degree have little or no knowledge of the relevance of IP. The upcoming generation needs to be sensitized to the nuances and importance of intellectual property through education by introducing basic IP courses which could begin as an optional subject at the school level and included as a compulsory paper in all technical education programmes. An increase in financial resources for providing technical assistance for developing an IP culture which fuels innovation, encourages protection of IP and enables commercialization and trade in IP is critical to the success of the development agenda. A decade ago information and communications technology (ICT) was not widely regarded as central to the achievement of national economic growth and the reduction of poverty. Today such technologies are commonly viewed as a key component to the achievement of both goals. According to a recent study by the Organization for Economic Cooperation and Development (OECD), there is clear evidence that ICT acts as a driver of economic growth for many industrialized countries.

There are, nonetheless, persistent concerns about the disparities related to the spread of information and communications among rich and poor countries, a problem often referred to as the “digital divide.” The G8’s Digital Opportunity Task Force provided a useful description of this concept: “This ‘digital divide’ is, in effect, a reflection of existing broader socio- economic inequalities and can be characterized by insufficient infrastructure, high cost of access, inappropriate or weak policy regimes, inefficiencies in the provision of telecommunications networks and services, lack of locally created content, and uneven ability to derive economic and social benefits from information-intensive activities.”

Harnessing ICT to advance a country’s economic development goals requires developing and least developed countries to address complex issues related to infrastructure, investment, regulation, and human capital. It is clear that many of these issues are beyond WIPO’s mandate, specialized competence, and institutional capacity. However, consistent with WIPO’s core objective to support developing and least developed countries to maximize the use and effectiveness of IP as a tool for economic and social, and cultural development, WIPO has an important role to play. In many ways, WIPO’s development-related work in the area of ICT is already well advanced.

Countries need to think about the service levels that their national IPR administration offices need to deliver and the performance standards to which they will be measured. This should be taken into account while taking decisions on the design of the national regime and use of international/regional co- operation systems. There may be a need to think about minimum standards to deliver priorities for an IPR regime. The whole spectrum may not be necessary.

There is an urgent need to define realistic concepts regarding the role and function of small IP offices, in particular in the patents field, in developing countries, instead of modeling the structure of developed countries. Regarding e.g. the issue of establishing examination capacities or not, the question of a threshold (size of country, economic level, human resources, etc), below which the feasibility of such a service could be seriously questioned, has to be put on the table. Such discussions are a missing element at present and are lowering the effectiveness of technical assistance.

Developing countries need an IP infrastructure which has the capacity to grant IPRs with a high presumption of validity keep accurate and readily accessible registries and records. The system should have the ability to correct defects in IPR titles through administrative

rather than Standing Information (SCIT) could be a forum for discussion focused on the importance of intellectual property-related aspects of ICT and its role in economic and cultural development. Specific attention should be focused on assisting Member States to identify practical strategies to use IP/ICT for economic, social and cultural development. Once a Member State has identified specific projects with achievable goals, the proposed WIPO Partnership Database may play a useful role in matching IP/ICT development-Committee on Technologies judicial means as in many developing countries, judicial systems do not function well for any area of law.

Implementation is more than just law and that the gap between what exists in developing countries and the requirements of WTO compliance has been underestimated. Small countries have taken quantum leap in legislation, and it was suggested that they have felt a pressure to implement new laws and that some countries have relied on implementing model legislation. Regulations and procedures are lacking. It is also argued that governments in these countries also need to take a paternalistic approach and energise stakeholders, which is not the case in developed countries. Developing countries do not have sufficient intellectual property expertise and there is low awareness about the operation, costs and benefits of an intellectual property regime. It is imperative that resources and talent in the area of intellectual property management be made available at an international level. The need for short-term technical assistance to developing countries could be met by secondment of expatriate staff. This would allow immediate workloads to be processed and capacity to be built over the longer term.

Developing countries are essentially users of intellectual property assets. They need to have more than just the minimum institutional capacities required to provide a reasonable smooth system for administration and enforcement of IPR's. They require a wider institutional framework in order to regulate IPRs to ensure open contestable markets for goods and services essential to poor peoples livelihoods, support development of their national innovation capabilities through maximizing access to technologies and knowledge assets protected by IPRs through means like subsidized patent information services and support to upgrade technology transfer capabilities in universities and strengthen research and educational institutions and create public awareness.

Intellectual Property is not mainstreamed into assistance programs, because they do not see how intellectual property can help poor people. In a number of developing countries, for example, there is some political support for copyright but it is slow to develop for patents. There is a need for short-term assistance since the IP law has to be administered immediately.

Developing countries require sophisticated technical expertise and decision making capabilities to formulate policy and adopt legislation that balances the different public policy objectives and stakeholders interests within the context of economic and technological development. Developing countries may need assistance in making an assessment analysis before making formal requests for financial assistance. One way of doing this could be to

support a national policy process that generates a national action plan with priorities. Small states have special requirements for technical and financial assistance similar to LDCs due to small market size and small volumes of IPR applications, leading to problems with the financial sustainability of IPR institutions. Small economies may also need long-term secondment of expatriate staff.

Fourteen activities under the theme "Technical Assistance and Capacity Building" have been approved which are as under

1. WIPO technical assistance shall be, inter alia, development oriented, demand driven and transparent, taking into account the priorities and the special needs of developing

countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion. In this regard, design, delivery mechanisms and evaluation processes of technical assistance programs should be country specific.

2. Provide additional assistance to WIPO through donor funding, and establish Trust Funds or other voluntary funds within WIPO specifically for LDCs, while continuing to accord high priority to finance activities in Africa through budgetary and extra budgetary resources, to promote, inter alia, the legal, commercial, cultural, and economic exploitation of intellectual property in these countries.

3. Increase human and financial allocation for technical assistance programs in WIPO for promoting a, inter alia, development oriented IP culture, with an emphasis on introducing intellectual property at different academic levels and on generating greater public awareness on IP.

4. Place particular emphasis on the needs of SMEs and institutions dealing with scientific research and cultural industries and assist Member States, at their request, in setting up appropriate national strategies in the field of IP.

5. WIPO shall display general information on all technical assistance activities on its website, and shall provide, on request from Member States, details of specific activities, with the consent of the Member State(s) and other recipients concerned, for which the activity was implemented.

6. WIPO's technical assistance staff and consultants shall continue to be neutral and accountable, by paying particular attention to the existing Code of Ethics, and by avoiding potential conflicts of interest. WIPO shall draw up and make widely known to the Member States a roster of consultants for technical assistance available with WIPO.

7. Promote measures that will help countries deal with IP related anti competitive practices, by providing technical cooperation to developing countries, especially LDCs, at their request, in order to better understand the interface between intellectual property rights and competition policies.

8. Request WIPO to develop agreements with research institutions and with private enterprises with a view to facilitating the national offices of developing countries, especially LDCs, as well as their regional and sub regional IP organizations to access specialized databases for the purposes of patent searches.

9. Request WIPO to create, in coordination with Member States, a database to match specific IP related development needs with available resources, thereby expanding the scope of its technical assistance programs, aimed at bridging the digital divide.

10. To assist Member States to develop and improve national IP institutional capacity through further development of infrastructure and other facilities with a view to making national IP institutions more efficient and promote fair balance between IP protection and the public interest. This technical assistance should also be extended to sub-regional and regional organizations dealing with IP.

11. To assist Member States to strengthen national capacity for protection of domestic creations, innovations and inventions and to support development of national scientific and technological infrastructure, where appropriate, in accordance with WIPO's mandate.

12. To further mainstream development considerations into WIPO's substantive and technical assistance activities and debates, in accordance with its mandate.

13. WIPO's legislative assistance shall be, inter alia, development oriented and demand driven, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion.

14. Within the framework of the agreement between WIPO and the WTO, WIPO shall make available advice to developing countries and LDCs, on the implementation and

operation of the rights and obligations and the understanding and use of flexibilities contained in the TRIPS Agreement.

Cluster B: Norm Setting, Flexibilities, Public Policy and Public Domain

Conventional IPR instruments have failed to ensure the enforceability of traditional knowledge related IPRs as they have been developed to protect modern industrial property. Protection of TK / TCE's thus requires separate treatment. This could be based on:

- defensive mechanisms i.e. preventing others from seeking IPRs to one's TK such as mandatory disclosure of source of genetic resources as well as PIC (prior informed consent) & benefit sharing; or
- positive protection i.e. establishing IPR to one's TK e.g. creation of TK registries or legislative tools such as declaration of rights of indigenous and local communities including the ownership of their TK or the recognition of customary laws in national legislation

Specific TK protection measures should be developed on the basis of the international policy discussions carried out in the Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge & Folklore.

In developing countries the economic and social conditions of the population and the need to provide for basic requirements such as food, health and education, make it essential to establish priorities and on occasions to disregard elements which although important for development do not satisfy immediate requirements. In this context, even in the countries in which a modern intellectual property system exists, it has not been feasible to involve society in intellectual property matters, i.e. there is no appropriate culture of intellectual property use and enforcement.

The lack of knowledge of the system on the part of the population is commonly observed when the population considers the failure to observe the system or infringements thereof as conduct which is socially acceptable; for this sector, the benefits derived from the intellectual property system and the use of the system as a development factor are completely alien. Lack of awareness of the IP system has become a cause of inefficiency as well as an obstacle to development.

Appropriate dissemination and understanding of the system is therefore a must. A key issue for developing countries is the institutional capacity for commercialization of research and knowledge. Related to this, a new area for technical/financial assistance could be subsidizing acquisition/ maintenance of IPRs by developing countries in developed countries, where costs can be very high. Best/ worst practices and guidelines could be developed, based on case studies and the experiences of concerned parties. More resources need to be devoted to document experiences of actual uses of IPRs to show to what extent they can be beneficial.

WIPO should devise a programme to encourage and equip civil society groups and NGO's to take up these tasks by providing them specialized training and institutional support besides encouraging their participation in WIPO programmes and activities through a separate voluntary fund set up on the same lines as the voluntary fund to support indigenous communities and LDC's. Counterfeiting and intellectual property piracy is having a devastating effect on large companies, SMEs, and individual authors, artists and inventors around the world. The OECD estimates that counterfeiting and intellectual property piracy costs companies as much as \$638 billion per year. There is also significant and growing evidence that rampant counterfeiting and intellectual property piracy is a

brake on economic development and a deterrent to foreign direct investment (FDI) and technology transfer.

There are important implications for development as a result of uncontrolled counterfeiting and piracy. Countries with inadequate intellectual property systems are often isolated from technological advances, fail to provide their citizens with incentives to create and innovate and disseminate new knowledge, and lose the collateral benefits of FDI and technology transfer, including increasing the tax base and educating a skilled work force for follow-on creativity and innovation. Conversely, there is mounting evidence that reductions in counterfeiting and intellectual property theft are positively correlated with the acceleration of investment in knowledge-intensive industries such as software and information technology, sectors that are critical for countries making the transition to the knowledge economy.

Although the costs of counterfeiting and intellectual property piracy (and the benefits of reducing counterfeiting and piracy) are beginning to come into sharper focus, more work remains to be done. To help fill some of these knowledge gaps, the WIPO Advisory Committee on Enforcement should discuss and analyze the relationship between the rates of counterfeiting and piracy of intellectual property and technology transfer, foreign direct investment and economic growth. The WIPO Secretariat could assist in the collection of data on piracy rates.

The present IP system is not absolute and not as beneficial as it should be to developing countries. New mechanisms must be found and a holistic approach should be taken. It is therefore important to simultaneously examine the feasibility of open collaborative projects to develop public goods as well as non-exclusionary systems for fostering, creativity, innovation and transfer of technology. It should however be kept in mind that the Creative Commons licenses are not certified by the Open Source Initiative. The maintainers of the Debian GNU/Linux distribution do not believe that even the Creative Commons Attribution License, the least restrictive of the licenses, adheres to the Debian Free Software Guidelines due to the license's anti-DRM provisions and its requirement in section 4a that downstream users remove an author's credit upon request from the author.

Nine activities listed below have been approved for Cluster B: Norm Setting, Flexibilities, Public Policy and Public Domain:

15. Norm setting activities shall:

- be inclusive and member driven;
- take into account different levels of development;
- take into consideration a balance between costs and benefits;
- be a participatory process, which takes into consideration the interests and priorities of all WIPO Member States and the viewpoints of other stakeholders, including accredited inter governmental organizations and non governmental organizations; and
- be in line with the principle of neutrality of the WIPO Secretariat.

16. Consider the preservation of the public domain within WIPO's normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain.

17. In its activities, including norm setting, WIPO should take into account the flexibilities in international IP agreements, especially those which are of interest to developing countries and LDCs.

18. To urge the IGC to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.

19. To initiate discussions on how, within WIPO's mandate, to further facilitate access to knowledge and technology for developing countries and LDCs to foster creativity and innovation and to strengthen such existing activities within WIPO.

20. To promote norm-setting activities related to IP that support a robust public domain in WIPO's Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions.

21. WIPO shall conduct informal, open and balanced consultations, as appropriate, prior to any new norm setting activities, through a member-driven process, promoting the participation of experts from Member States, particularly developing countries and LDCs.

22. WIPO's norm setting activities should be supportive of the development goals agreed within the UN system, including those contained in the Millennium Declaration.

The WIPO Secretariat, without prejudice to the outcome of Member States considerations, should address in its working documents for norm-setting activities, as appropriate and as directed by Member States, issues such as: a) safeguarding national implementation of intellectual property rules b) links between IP and competition c) IP-related transfer of technology d) potential flexibilities, exceptions and limitations for Member States and e) the possibility of additional special provisions for developing countries and LDCs.

23. To consider how to better promote pro-competitive IP licensing practices, particularly with a view to fostering creativity, innovation and the transfer and dissemination of technology to interested countries, in particular developing countries and LDCs.

Cluster C: Technology, Transfer, Information and Communication Technologies (ICT) and Access to Knowledge

Access to technologies required by developing countries needs to be facilitated to accelerate their economic and social development. Prospective technology seekers in developing countries face serious difficulties in their commercial dealings with technology holders in developing countries due to imperfections in technology markets, lack of experience and skill of enterprises in developing countries to ensure adequate legal arrangements for the acquisition of technology and legislative and administrative government policies which influence the flow of technology to and its acquisition by developing countries. (technology transfers to developing countries have not taken place when they were needed most e.g. Montreal protocol, Biodiversity convention & more recently energy efficient technologies to combat global warming).

Considering that WIPO has a constitutional mandate, by virtue of the Agreement with the UN, to facilitate transfer of technology, it should identify what measures are needed within the organisation to address transfer of technology issues, including related competition policies and the facilitation of the transfer of essential technologies to developing countries. Improving the quality of technical assistance should be emphasized rather than just the quantity: this suggests a requirement for independent impact evaluation and lesson learning.

There is a balancing required between the monopoly privilege granted to the IP holder and the public interest (including consumer welfare, the competition from other producers, and national development prospects). The appropriate balance requires the right policies that enable that IP be appropriately given for correct reasons and to the correct parties, and that they be of an appropriate period, and that flexibilities and exemptions and exclusions are provided to safeguard vital public interests.

If the balance is tilted excessively to the IP holder, then one consequence is that the IP facilitates a stream of monopoly profits beyond what is justified for recovering the costs of innovation, and society bears the costs unreasonably. These may include prevention of

access to goods and services (including essentials such as medicines, food and information, and important inputs for production), curbing of industrial development, an overall reduction in competition and its benefits for resource allocation, and monopolization in products, sectors or the economy as a whole.

It is thus important, especially for developing countries, that the standards of IP be appropriate, that there be adequate exclusions and flexibilities, and that the framework enables IP to be awarded appropriately for the right inventions and to the right parties, and that there be sufficient provisions policies and legal provisions that counter the abuse of IP privileges when they occur.

Pro-competition principles and measures that exist in IP- related international treaties should be fully recognized and appreciated and technical assistance should be provided to developing countries to enable them to be aware of these and to incorporate them where possible in national legislation, policy and practice. For example, Article 8.2 of TRIPS under general principles states that appropriate measures (consistent with the agreement's provisions) may be needed to prevent abuse of IPRs by right holders or the resort to practices which unreasonably restrain trade or adversely affect technology transfer. While licensing is a legitimate activity of IPR holders and in most cases can be seen as pro-competitive in legitimizing access to technology to third parties, these activities may also (as noted by the OECD) be "anti- competitive where they are a mere sham for a cartel arrangement, where they restrict competition between technologies that are economic substitutes for one another or where they exclude new technologies from the market."

Section 8 of TRIPS on "Control of anti-competitive practices in contractual licenses" has an Article 40 that recognizes that some licensing practices or conditions pertaining to IPRs which restrain competition may have adverse effects on trade and impede technology transfer and dissemination. Article 40.2 says that nothing in the agreement shall prevent members from specifying in their legislation licensing practices or conditions that abuse IPRs, having adverse effect on competition, and a member may adopt appropriate measures to prevent or control such practices, including exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in light of relevant laws and regulations of that member. Article 40.3 also provides for consultations and cooperation among members (including through supply of non- confidential information) to deal with IPR owners that are undertaking anti-competitive practices in violation of a requesting member's laws.

Several developed countries have laws or regulations that hold certain anti-competitive practices as per se unlawful. The US Antitrust Guidelines for the Licensing and Acquisition of IPRs 1995 states that among the restraints that have been held per se unlawful (by courts in the past) are naked price- fixing, output restraints and market division among horizontal competitors, as well as certain group boycotts and resale price maintenance. To determine whether a particular restraint in a licensing arrangement is given per se or rule of reason treatment, the agencies will assess whether the restraint will contribute to an efficiency-enhancing integration of economic activity.

Japan's Guidelines for Regulation of Unfair Trade Practices with respect to Patent and Know How Licensing Agreements (introduced in 1989) treats 5 types of restrictions as unfair trade practices, unless specific justification can be shown to the contrary; these are restrictions and domestic prices of patented goods, prohibitions on handling or using competitors' goods or technology or requirements on payment of royalties after licence expiry, R&D restrictions and exclusive grant back requirements.

Some Commonwealth countries, following the UK, have a provision in their patent laws that certain anti-competitive practices in patent licences are automatically deemed to be null and void. For example, Australia's Patents Act 1990 hold invalid any conditions that restrict the licensee from purchasing or using a product or process supplied by the licensor's competitors or that requires the licensee to acquire a product not protected by the patent from the licensor; in addition the Australian Trade Practices Act 1974 specifically prohibits 5 activities: anti-competitive agreements (including price fixing and exclusionary provision), misuse of market power, exclusive dealing, resale price maintenance, mergers and acquisitions with a substantial lessening of competition.

According to the above regulations, the mentioned features in contractual IP licences are anti-competitive per se and thus deemed unlawful in general; thus it would not require a case-by-case examination to determine whether the mentioned activities are anti-competitive. There are other provisions in TRIPS that deal with competition issues. For example, Article 31 on the use of patents without authorization of the right holder, has a sub-paragraph (k) relating to anti-competitive practices. If a compulsory license is granted to remedy a practice determined after judicial or administrative to be anti-competitive, the obligations in sub-para (b) (that before a compulsory license can be given, efforts have to be made to obtain a voluntary license) and in sub-para (f) (that a compulsory license has to predominantly for the supply of the domestic market) are waived. Moreover "the need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases" and authorities can refuse termination of authorization if and when conditions which led to such authorization are likely to recur. Developing countries should include this pro-competitive safeguard provision and measure in their national legislation and policy.

Generally, it would be important for developing countries to incorporate the pro-competition principles and elements in their national laws and regulations relating to IP. Moreover, they should establish provisions within national competition law and regulations that prohibit anti-competitive practices in IP-related licenses.

The present IP system, international and national levels, should be evaluated in light of the crucial need for "balances" in the IP system, to enable both innovation and the meeting of the public interest and development needs.

Considering the growing importance of access to knowledge, of protecting and promoting access to the cultural heritage of peoples, countries and humanity, and the need to maintain a robust public domain through norm-setting activities and enforcement of exceptions and limitations to intellectual property rights, what measures are needed within WIPO to:

- facilitate access to knowledge generally around the world and specifically in developing countries for example by means of a Treaty on Access to Knowledge; and
- maintain and build a robust public domain in all WIPO Member States and other countries.

Activities from serial number 24 to 32 have been approved for inclusion in the WIPO Development Agenda in Cluster C: Technology Transfer, Information and communication Technologies (ICT) and Access to Knowledge

24. To request WIPO, within its mandate, to expand the scope of its activities aimed at bridging the digital divide, in accordance with the outcomes of the World Summit on the Information Society (WSIS) also taking into account the significance of the Digital Solidarity Fund (DSF).

25. To explore IP related policies and initiatives necessary to promote the transfer and dissemination of technology, to the benefit of developing countries and to take appropriate

measures to enable developing countries to fully understand and benefit from different provisions, pertaining to flexibilities provided for in international agreements, as appropriate.

26. To encourage Member States, especially developed countries, to urge their research and scientific institutions to enhance cooperation and exchange with research and development institutions in developing countries, especially LDCs.

27. Facilitating IP related aspects of ICT for growth and development: Provide for, in an appropriate WIPO body, discussions focused on the importance of IP related aspects of ICT, and its role in economic and cultural development, with specific attention focused on assisting Member States to identify practical IP related strategies to use ICT for economic, social and cultural development.

28. To explore supportive IP related policies and measures Member States, especially developed countries, could adopt for promoting transfer and dissemination of technology to developing countries.

29. To include discussions on IP-related technology transfer issues within the mandate of an appropriate WIPO body.

30. WIPO should cooperate with other intergovernmental organizations to provide to developing countries, including LDCs, upon request, advice on how to gain access to and make use of IP-related information on technology, particularly in areas of special interest to the requesting parties.

31. To undertake initiatives agreed by Member States which contribute to transfer of technology to developing countries, such as requesting WIPO to facilitate better access to publicly available patent information.

32. To have within WIPO opportunity for exchange of national and regional experiences and information on the links between IP rights and competition policies.

Cluster D: Assessment, Evaluation Studies and Impact

The global harmonization of IP laws (towards the standards and practices of developed countries), especially through the WTO, WIPO and bilateral/ regional agreements, has contributed to the imbalances and the spread of conditions that make it more difficult for developing countries and their enterprises and institutions to compete.

Thus, a review of the international IP frameworks is required to determine the sources of the imbalances, while a review of national frameworks are also required so that the existing flexibilities can be properly made use of. Intellectual Property has to be presented [rightly so] as a tool for development. The presentation needs to be made in the context of industries that have a cultural impact as well such as information technology and entertainment.

Information technology products, such as computers, telecommunications equipment and software, have become a cornerstone of modern life. The economies of developed and developing countries have benefited greatly from the growth of information technology industries themselves, as well as the enhanced competitiveness most industrial sectors enjoy as a result of adopting information technology. Critical to the growth of information technology, however, has been intellectual property rights. Patents, copyrights, designs, trade secrets and trademarks are all used to protect the significant investments that go into information technology products and guarantee future technological developments in this field.

The enforcement of intellectual property rights provides artists, scientists, designers and others creating intellectual property with the ability to protect the fruit of their endeavours. The incentives for individuals and businesses to engage in research and intellectual property-based activities would eventually disappear without effective enforcement.

However there is an absolute inadequacy of data on contribution of national creative and innovative industries as well as the incidence of piracy/ counterfeiting and other IPR violations.

WIPO Secretariat should assist in the collection & dissemination of data relating to:

- global piracy and counterfeiting rates
- contribution of national creative and innovative industries to the economy
- IPR enforcement action
- Judicial pronouncements and decisions related to IP

Training for judges, lawyers and other individuals engaged in enforcement is essential due to the fact that intellectual property laws frequently change as technologies develop.

A growing body of economic literature indicates that a major determinant in a country's long- term economic growth is that rate of innovation that takes place in an economy. A country's "innovation system" - the amalgamation of organizations, laws and policies that pertain to innovation -writing, other plays a key role in how well a country innovates. Intellectual property is a key component of any innovation system, because it grants an innovator's opportunity to be compensated for investment of time and resources that go into the creation of new products and services.

Another key factor in an innovation system is the commitment that public and private organizations make to funding research and development activities. Many economists have pointed out that since private companies are ultimately the organizations that commercialize technology and bring advances to the market place, their participation in R&D is critical. Thus, in developed countries, public research takes on a supporting role in the overall research framework. However, often a large part of a developing country's research capacity is in public research organizations like universities and government laboratories. This and other aspects of the links between IP and development need to be studied further.

The activities approved under this cluster include:

33. To request WIPO to develop an effective yearly review and evaluation mechanism for the assessment of all its development oriented activities, including those related to technical assistance, establishing for that purpose specific indicators and benchmarks, where appropriate.

34. With a view to assisting Member States in creating substantial national programs, to request WIPO to conduct a study on constraints to intellectual property protection in the informal economy, including the tangible costs and benefits of IP protection in particular in relation to generation of employment.

35. To request WIPO to undertake, upon request of Member States, new studies to assess the economic, social and cultural impact of the use of intellectual property systems in these States.

36. To exchange experiences on open collaborative projects such as the Human Genome Project as well as on IP models.

37. Upon request and as directed by Member States, WIPO may conduct studies on the protection of intellectual property, to identify the possible links and impacts between IP and development.

38. To strengthen WIPO's capacity to perform objective assessments of the impact of the organization's activities on development.

Cluster E: Institutional Matters Including Mandate and Governance

The idea of the WIPO coordinating and intensifying its cooperation on IP related issues with UN agencies in particular UNCTAD, UNEP, WHO, UNIDO, UNESCO and other relevant international organizations and increased NGO participation is important to look into issues that members from developing countries might have, besides coordinating IP related development assistance available from various sources. Such an arrangement would foster partnerships with civil society organizations across projects in developing countries to exploit areas of comparative advantage for economic, social and cultural gain. The activities under this cluster include:

39. To request WIPO, within its core competence and mission, to assist developing countries, especially African countries, in cooperation with relevant international organizations, by conducting studies on brain drain and make recommendations accordingly.

40. To request WIPO to intensify its cooperation on IP related issues with UN agencies, according to Member States' orientation, in particular UNCTAD, UNEP, WHO, UNIDO, UNESCO and other relevant international organizations, especially WTO in order to strengthen the coordination for maximum efficiency in undertaking development programs.

41. To conduct a review of current WIPO technical assistance activities in the area of cooperation and development.

42. To enhance measures that ensure wide participation of civil society at large in WIPO activities in accordance with its criteria regarding NGO acceptance and accreditation, keeping the issue under review.

43. To consider how to improve WIPO's role in finding partners to fund and execute projects for

IP related assistance in a transparent and member- driven process and without prejudice to ongoing WIPO activities.

44. In accordance with WIPO's member driven nature as a United Nations Specialized Agency, formal and informal meetings or consultations relating to norm-setting activities in WIPO, organized by the International Bureau, upon request of the Member States, should be held primarily in Geneva, in a manner open and transparent to all Members. Where such meetings are to take place outside of Geneva, Member States shall be informed through official channels, well in advance, and consulted on the draft agenda and program.

Cluster F: Other Issues

45. To approach intellectual property enforcement in the context of broader societal interests and especially development oriented concerns, with a view that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations", in accordance with Article 7 of the TRIPS Agreement.

Within goal number eight of the Millennium Development Goals contained in the Millennium Declaration, "to develop a global partnership for development", there exist tasks directly linked to the world intellectual property system, i.e.

- Develop further an open, rule-based, predictable and non-discriminatory trading and financial system, including the commitment to good governance of public affairs and poverty reduction, both nationally and internationally.

Development Program, the World Intellectual Property Organization has conducted activities designed to establish intellectual property systems or modernize those already in existence;

- Although it may be improved, an international standard- setting framework exists allowing nations to interact in accordance with a predictable and non- discriminatory system;
- The resources available to the governments of developing countries and international organizations are limited and should be used rationally;
- In order for the intellectual property system to be an efficient mechanism and to contribute to development its dissemination in society as a whole and not only among the players directly involved, i.e. governments, owners and system users, is essential; and reiterating that:
- Intellectual property is an essential mechanism for the development of humanity and a way to achieve balance and stability between developed and developing countries;
- Intellectual property constitutes a development tool and not a factor harmful to development;

• In

developing countries, develop and implement strategies for decent and productive work for youth.

• In cooperation with the private sector, make available the benefits of new technologies, especially information and communication technologies.

• As a United Nations specialized agency and under the auspices of the WIPO Cooperation for cooperation with

• Intellectual

constitutes a means of benefit for all people through the expansion of the opportunities resulting from new technologies, fundamentally information and communications technologies.

This WIPO Development Agenda should be considered an essential element in supporting the Millennium Development Goals, derived from the Millennium Declaration and linked inter alia to intellectual property, i.e. “to develop a global partnership for development.

REFERENCES:

1 WIPO, *Proposed Program and Budget at p. 18*

2 WIPO, *Proposed Program and Budget at p. 8.*

3 Derek H. C. Chen and Carl J. Dahlman, *“The Knowledge Economy, the KAM Methodology and World Bank Operations, The World Bank.*

4 WIPO PR/497

5 WIPO, *Proposed Program and Budget at p. 38.*

6 OECD, *ICT and Economic Growth: Evidence from OECD Countries, Industries and Firms*

7 Report of the Digital Opportunity Task Force (DOT Force), *“Digital Opportunities for All: Meeting the Challenge” at p. 6.*

8 WIPO, *Report on the Online Forum on Intellectual Property in the Information Society,*